Office - Supreme Court, U.S.
FILED
APR 13 1984
ALEXANDER L. STEVAS
CLERK

No. 83-436

In the Supreme Court of the United States

OCTOBER TERM, 1983

DONALD REGAN, SECRETARY OF THE TREASURY, ET AL., PETITIONERS

v.

RUTH WALD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

REX E. LEE
Solicitor General
RICHARD K. WILLARD
Acting Assistant Attorney General
PAUL M. BATOR
Deputy Solicitor General
CAROLYN F. CORWIN
Assistant to the Solicitor General
HAROLD J. KRENT
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

PETER J. WALLISON
General Counsel
Department of the Treasury
Washington, D.C. 20220

DAVIS R. ROBINSON
Legal Adviser
Department of State
Washington, D.C. 20520

TABLE OF AUTHORITIES

Cases: Page

Haig v. *Agee*, 453 U.S. 280 ..... 10, 18
United States v. *Yoshida International, Inc.*, 526 F.2d 560 14
Zemel v. *Rusk*, 381 U.S. 1 18

Statutes and regulations:

International Emergency Economic Powers Act, 50 U.S.C. (Supp. V) 1701 *et seq.* 1, 3, 11, 12, 13, 14, 15
50 U.S.C. (Supp. V) 1702(a)(1)(B) 11
Passport Act, 22 U.S.C. 211a 1, 2, 11, 12, 13, 14
Trading With the Enemy Act of 1917, 50 U.S.C. App. (& Supp. V) 1 *et seq.*:
§ 3, 50 U.S.C. App. 3 4
§ 5(b), 50 U.S.C. App. 5(b) ..... *passim*
31 C.F.R. Pt. 505 (1977) 15
31 C.F.R. Pt. 515 (1977):
Section 515.201 16
Section 515.560(a)(3) 5
Section 515.560(a)(5) 5
Section 515.560(a)(7) 5

Miscellaneous:

Annual Report of the Attorney General of the United States (1918) 6
Association of the Bar of the City of New York, *Freedom to Travel* (1958) 11
86 Cong. Rec. 5179-5180 (1940) 7
Department of State Press Release No. 473 (Aug. 22, 1957) *reprinted in Passport Legislation: Hearing on S. 806, et al. Before the Senate Comm. on Foreign Relations*, 86th Cong., 1st Sess. (1959) 11
Emergency Controls on International Economic Transactions: Hearings on H.R. 1560 and H.R. 2382 Before the Subcomm. on International Economic Policy and Trade of the House Comm. on International Relations, 95th Cong., 1st Sess. (1977) 16, 18

Miscellaneous—Continued: Page

Exec. Order No. 8389, 3 C.F.R. 645 (1940) 6
5 Fed. Reg. 3634 (1940) 6
6 Fed. Reg. 748 (1941) 6
45 Fed. Reg. 26940 (1980) (codified at 31 C.F.R. 535.209 (1980)) 12
8 Foreign Affairs Manual (1966) 10
H.R. Rep. 85, 65th Cong., 1st Sess. (1917) 4
H.R. Rep. 155, 65th Cong., 1st Sess. (1917) 3
H.R. Rep. 485, 65th Cong., 2d Sess. (1918) 5-6
N.Y. Times, Feb. 21, 1957 11
U.S. Treasury Dep't, *Discussion of Documents and Other Matters Pertaining to Foreign Funds Control* (1944) 6
United States-Cuba Trade Promotion: Hearing Before the Subcomm. on International Trade and Commerce of the House Comm. on International Relations, 94th Cong., 2d Sess. (1976) 9

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-436

DONALD REGAN, SECRETARY OF THE TREASURY, ET AL., PETITIONERS

v.

RUTH WALD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

The court of appeals held in this case that the President's authority under Section 5(b) of the TWEA to regulate economic transactions incident to travel to Cuba was not grandfathered in 1977. The bulk of respondents' brief is, however, devoted to different issues, ones not raised in our petition and not directly addressed by the court of appeals. They argue (Br. Part II)[1] that in fact TWEA Section 5(b) never encompassed the power to regulate travel-related transactions at all—that there was no such authority to be grandfathered. In a confusing sequence they precede that argument with the proposition (Br. Part I) that in any event the 1978 amendment to the Passport Act by implication comprehensively prohibits the exercise of any authority under the TWEA (or under IEEPA) to restrict travel-related expenditures, presumably repealing whatever such TWEA authority existed and was grandfathered.[2]

[1] Br. refers to respondents' brief in this Court.

[2] The sequence is confusing because the Passport Act argument (Part I of respondents' brief) is relevant only if their argument in Part II—that TWEA authority over travel-related transactions never existed—is rejected. The sequence adopted by respondents obscures the important point that the argument presented in Part

A central conceptual assumption dominates respondents' brief. That assumption is that the regulation of travel must, in the nature of things, be thought of as a unitary, single-track enterprise, presenting only a single question to be answered with one yes-or-no answer: May the Executive forbid travel? The answer to that question, say respondents, is to be found exclusively by examining the legislation governing the State Department's authority to restrict passports. Whatever answer that legislation provides then has overriding and preemptive force. If the answer is "yes," any regulation of economic transactions incident to travel is to be deemed ancillary, without independent legal significance. If the answer is "no"—if travel itself may not be prevented by refusing a passport—then all regulatory authority that may deter or restrict travel must, again in the nature of things, fall. The possibility that one statute may tell the Executive that it must issue a passport for travel to Cuba and —at the same time—another provide that the Executive may restrict the right to spend American dollars there, is simply not to be contemplated.

In fact this one-dimensional tidy universe need not exist and has never existed. International travel touches on a large variety of interests, so that regulations affecting such travel can and always have proceeded under different statutes on distinct regulatory tracks. Regulation pursuant to passport legislation is administered by the State Department; its purpose is to regulate travel as such; it can serve a variety of national security, foreign policy, and health and safety interests. Another track—formally, organizationally, and substantively distinct from passport controls—has been the regulation of economic transactions with foreign countries—including those incident to travel—during times of national emergency. The latter has always been authorized by separate legislation:

I, insofar as it has any bite at all, can prevail only if the 1978 Passport Act amendment is read to *repeal* authorities that *did* exist under Section 5(b) and *were* grandfathered in 1977.

To dispel this confusion, we discuss Part II of respondents' brief first; then we address Part I.

specifically, by Section 5(b) of the TWEA and more recently also by IEEPA; it is under the direct supervision of the Treasury Department. These tracks have coexisted as distinct regulatory enterprises because, although obviously related, they can raise independent policy issues.[3] There is, in sum, nothing impossible or illogical about a complex universe in which the question whether Americans should be denied a passport to travel to Cuba and the question whether Americans should be free to spend American dollars in Cuba are conceived of as different questions that do not necessarily and always have to have a congruent answer.

I.

In an effort to manufacture a simple one-track regulatory universe, respondents in Part II of their brief (Br. 21-31) seek to wipe TWEA from the scene. They put forward the argument (implicitly rejected by the court of appeals) that Section 5(b)—which authorizes regulation of "any * * * transactions involving, any property in which any foreign country or a national thereof has any interest"—has never been thought to confer authority to regulate transactions incident to "personal" travel.[4]

---

[3] To give a parallel example, the aim of preventing the outflow of hard currency has frequently (*e.g.*, post-war Britain) led to the imposition of travel-related currency controls that can have a substantial impact on the ability to travel; but these regulations do not seek to prevent travel as such and are not in any way inconsistent with the issuance of a passport for travel.

[4] Respondents do not explain why the all-encompassing language of Section 5(b) excludes the regulation of travel-related transactions; that language is simply dismissed with the grudging concession (Br. 22 n.40) that it is "conceivable" that "personal" travel expenditures are covered by the statutory words.

Respondents (Br. 22) draw a distinction between "personal" travel expenditures and the "commercial intercourse" they identify as the subject of the TWEA. In fact, the TWEA legislative history respondents cite in support of this characterization does not relate to Section 5(b). (The latter was not included in the House version of the bill; its provisions authorizing the regulation and prohibition of transactions were not added until the conference committee stage. H.R. Rep. 155, 65th Cong., 1st Sess. 3-4, 10 (1917) (con-

They go so far as to add that "until the 1970s not a single public action by the executive branch or word uttered in Congress suggests that the TWEA could be used to regulate or prohibit personal travel expenditures" (Br. 24). These contentions cannot withstand scrutiny.

1. We start with the more recent period: namely, the crucial events of 1977, when—on respondents' own submission—the decision was supposedly made to remove "all restrictions on travel to Cuba" (Br. 4). Respondents' account of what happened in 1977 is remarkably evasive. Their brief (Br. 4, 7, 11-12) suggests that in 1977 President Carter simply held a news conference and removed passport restrictions, and that those events then somehow immediately merged into Congress's 1978 amendment to the Passport Act—the whole process adding up to a single simple national decision to eliminate any and all restrictions on and deterrents to travel to Cuba.

What, in fact, did President Carter do in 1977? He proceeded under two separate statutes. First, he instructed the State Department to remove area restrictions instituted under the Passport Act. Second, the President —acting through the Treasury Department—revised the assets control regulations promulgated under Section 5(b) of the TWEA by issuing limited general licenses authorizing most expenditures incident to travel (see Gov't Br. 8-9). The obvious understanding was that the pre-existing regulations issued under TWEA Section 5(b)

---

ference report).) That history seems to relate primarily to Section 3 of the TWEA, which refers to "trade." Even that section has a broader scope than respondents suggest. The House report stated: "Citizens can not be permitted directly or indirectly to augment the material resources of the enemy by commercial intercourse. * * * * * The trade or commerce regulated or prohibited * * * covers almost every imaginable transaction, and is forbidden and made unlawful except when allowed under the form of licenses." H.R. Rep. 85, 65th Cong., 1st Sess. 2-3 (1917).

In any event, there is little substance in the distinction between "personal" and "commercial" transactions. Spending money abroad for an airline ticket or a hotel room is a commercial transaction, whether undertaken in connection with "personal" travel or business travel.

did in fact prohibit such expenditures. Removing passport restrictions did not automatically eliminate these prohibitions; independent action under TWEA was needed and was in fact taken. Moreover, the President clearly acted on the belief that these two regulatory regimes did not have to conform perfectly with each other. Passport restrictions on travel to Cuba were eliminated; but the 1977 TWEA regulations maintained several important restrictions on financial transactions incident to travel to Cuba. For example, transactions involving *scheduled* "flights or voyages to, from, and in Cuba" were not licensed by the general license (31 C.F.R. 515.560(a)(5) (1977)). Under respondents' reading of the TWEA, that restriction—surely a very significant deterrent to travel to Cuba—was presumably wholly illegal. Certainly its very existence disproves the claim that it was universally assumed that TWEA had nothing to do with "personal travel expenditures." [5]

2. The assumption that travel-related transactions are subject to independent regulation under Section 5(b) of the TWEA, quite apart from passport restrictions, rests on a long historical tradition.[6] Respondents themselves

---

[5] The 1977 Treasury regulations also retained the prohibitions on purchase and bringing back to the United States of more than $100 worth of Cuban goods for personal use and on contracts between domestic credit card issuers and Cuban enterprises for issuance of credit to travelers. 31 C.F.R. 515.560(a)(3) and (a)(7) (1977).

[6] Respondents suggest (Br. 23) that the 1918 enactment of a statute authorizing the President to prohibit any United States citizen from departing or entering the United States without a valid passport is an early indication that Congress believed the TWEA did not authorize regulation of travel-related transactions. But that suggestion merely reflects respondents' erroneous assumption that regulation affecting travel has always proceeded under a preemptive one-track system. In fact the 1918 Congress was concerned primarily with controlling the movements (both into and out of the United States) of individuals thought to be German agents (including American citizens and neutral aliens, as well as enemy aliens)—a problem that could not have been readily solved by regulation under the TWEA. See, *e.g.*, H.R. Rep. 485, 65th

refer to the fact that in 1940 President Roosevelt, relying expressly on TWEA Section 5(b), issued Exec. Order No. 8389, 3 C.F.R. 645 (1940). That Executive Order initiated the first comprehensive Section 5(b) assets control program, prohibiting all unlicensed property transactions with respect to a long list of foreign countries involved in World War II.[7] Pursuant to that Executive Order, President Roosevelt in 1940 issued General License No. 33, authorizing remittances of up to $250 (later $500) per month to any United States citizen within any foreign country "for the necessary living and traveling expenses of the payee and his household." 6 Fed. Reg. 748 (1941); 5 Fed. Reg. 3634 (1940).[8] The meaning of this is clear. President Roosevelt obviously assumed just what President Carter assumed—that TWEA Section 5(b) author-

---

Cong., 2d Sess. 2-3 (1918); Annual Report of the Attorney General of the United States 39-40 (1918).

Respondents refer to statements of government officials over the years that existing statutes provided no criminal penalties for violation of passport restrictions (Br. 28-29). But these statements mean only what they say: that violations of *passport* restrictions were not criminal. They neither say nor imply that violations of TWEA restrictions on financial transactions were not punishable if the transaction was incident to personal travel.

[7] Exec. Order No. 8389 was amended a number of times during 1940 and 1941. The amended version is reproduced as Exhibit G to our supplemental brief filed in the court of appeals.

[8] General License No. 33 was promulgated, not to encourage travel, as respondents imply (Br. 24 & n.43), but because many Americans had been stranded in invaded countries and needed financial assistance from friends and relatives in the United States. U.S. Treasury Dep't, *Discussion of Documents and Other Matters Pertaining to Foreign Funds Control* 192, 201 (1944). The general policy of the government was to encourage Americans to return to the United States (*id.* at 192, 219-220).

The amended version of General License No. 33 is reproduced as Exhibit H to our supplemental brief in the court of appeals. For the Court's convenience, we are lodging with the Clerk of the Court and providing to respondents' counsel a copy of relevant pages from the Treasury Department document referred to in the preceding paragraph.

ized him to determine, quite apart from passport regulations, whether and how far to permit expenditures incident to personal travel. His action prohibited such transactions in excess of $250 (later $500) a month (except pursuant to a specific license). Respondents provide no understandable account of the meaning of these events (see Br. 24 & n.43), which directly contradict their assertion that "[t]here was no use of the TWEA for travel transactions in World War II" (Br. 24). Respondents' legal argument clearly implies that President Roosevelt's action—like President Carter's 1977 action—was *ultra vires*. But it must be remembered that they support their legal argument entirely by the claim that no such authority was in fact ever asserted.[9]

3. Under the Cuban Assets Control Program regulation of travel-related transactions under the TWEA has been open and pervasive ever since its inception in 1963.[10] License files of the Office of Foreign Assets Control show that from 1963 through 1977 that office processed at least 900 applications for licenses to engage in travel-related transactions involving Cuba. Licenses were issued to government officials and other members of official delegations, attorneys,[11] media representatives, researchers,

---

[9] Congress, too, clearly assumed in 1940 that a license would be necessary in order to make a transfer of funds in connection with travel to countries like Denmark or Norway (and even to countries not involved in the war, such as Argentina). See the somewhat jocular exchange on this subject between Senators Danaher and Connally at 86 Cong. Rec. 5179-5180 (1940) during the debate on the amendment and reenactment of Section 5(b).

[10] In 1950, comprehensive assets control programs were instituted with respect to North Korea and China. In connection with those programs, the Treasury Department made it clear (see page 11, *infra*) that licenses were required for property transactions incident to travel.

[11] For example, as early as 1963, respondents' lead counsel applied for and received f om the Treasury Department a license for "all transactions incidental to your personal travel to and from Cuba and personal maintenance while in Cuba as attorney for the Government of Cuba" (OFAC License No. C883, issued to Leonard B. Boudin, Aug. 6, 1963). See Exhibit B to our supplemental brief

individuals with seriously ill relatives in Cuba, representatives of religious groups, individuals participating in sports or cultural events, and individuals representing foreign-based subsidiaries of United States corporations. Each license stated that it was "[g]ranted under the authority of Section 620(a), Public Law 87-195, and under the authority of Section 5(b) of the Act of October 6, 1917, as amended."

Respondents characterize the Treasury's exercise of TWEA authority with respect to travel-related transactions as "ancillary"—apparently because the Treasury generally issued licenses for Cuban travel-related transactions only if the State Department had validated an individual's passport for travel to Cuba (Br. 12 & n.25). It is not clear what the term "ancillary" is meant to suggest here. There are obvious reasons of practicality and coherency in foreign policy for coordinating the issuance of licenses with the issuance of passports; that practice is irrelevant to the question whether independent TWEA authority did or did not exist. And we assume that respondents are not advocating the paradoxical proposition that the TWEA did authorize restrictions on travel-related transactions, but only during periods when *another* statute authorized the withholding of a passport.

4. There can be no doubt that Congress was aware of the Treasury's position that Section 5(b) authorizes regulation of travel-related transactions and its practice of requiring licenses for such transactions in the case of countries covered by assets control programs. As we noted in our opening brief (at 47 & n.43), there were references to such coverage at the 1977 subcommittee sessions during which the grandfather clause was debated.

---

filed in the court of appeals. We have offered counsel for respondents the opportunity to inspect copies of the license applications and licenses we have located in OFAC files.

In addition to issuing licenses, the Treasury Department advised travel agencies, travel publications, corporations, and individuals that unlicensed expenditures in connection with travel to Cuba were illegal. We filed several examples of such correspondence in a submission to the court of appeals, dated December 30, 1982.

And in 1976 the Treasury Department gave a full account to Congress of its policy and of its actions to secure compliance with the prohibition on unlicensed travel-related transactions involving Cuba. Stanley Sommerfield, Acting Director of the Office of Foreign Assets Control, summed up the policy: "American citizens—businessmen and otherwise—are not legally allowed to go to Cuba and spend money there without a license." *United States-Cuba Trade Promotion: Hearing Before the Subcomm. on International Trade and Commerce of the House Comm. on International Relations*, 94th Cong., 2d Sess. 45 (1976). Mr. Sommerfield described several specific steps the Office of Foreign Assets Control had taken to ensure compliance:

> To deal with this possibility [of TWEA violations], we are now requiring every American firm which applies for a subsidiary license to state whether any of its American citizens, officers or employees has visited Cuba since October, 1975. If so, they are required to describe the relationship between that Cuban visit and the contemplated subsidiary trade. If we find such a connection, we will deny the requested license. * * *
>
> We have also investigated one case of travel to Cuba by a "consultant," who was accompanied by executives of another firm (his clients). These Americans traveled as guests of the Cuban regime, and it appears that no commercial business was concluded. We are, however, still investigating the case.

Id. at 48; see also *id.* at 5-6 (testimony of O. L. Freeman), 10 (testimony of K. Jones). And, of course, those Members of Congress who traveled to Cuba or to other countries subject to an embargo knew from personal experience of the need to obtain a Treasury license for travel-related transactions.[12]

---

[12] Our examination of OFAC files indicates that during 1974-1977 the Treasury issued 16 licenses (some covering more than one person) authorizing travel-related transactions in Cuba for members of Congress and their staff. Those who received such licenses

5. Respondents make much of the fact that the government has never initiated a prosecution under the TWEA for violation of a prohibition against travel-related expenditures (Br. 25-27). There are, of course, many reasons that may lead the government to decide not to prosecute a case of this sort—including lack of evidence that the traveler spent his own dollars in Cuba, or that the expenditures were made with the requisite specific intent. The magnitude of any violation also may play an important role.[13] In fact, there is little evidence to support respondents' claims (Br. 25-26 & n.47) of "widespread" evasions of restrictions on travel-related expenditures.

---

included Representative Jonathan Bingham and R. Roger Majak, respectively Chairman and Staff Director of the subcommittee that drafted the grandfather clause.

Respondents contend (Br. 27) that passports issued during the 1960s and 1970s clearly implied that "travel expenditures [involving Cuba] were lawful." In fact, the sample passport reproduced as Appendix B to respondents' brief merely states (at 7570) that United States courts have interpreted United States law as "not restricting the travel of a U.S. citizen to any foreign country or area." The passport goes on to state that "the use of a U.S. passport" for travel to Cuba "is authorized only when specifically validated for such travel." Those who did obtain such validation were specifically advised by the State Department that "the Cuban Assets Control Regulations * * * prohibit all unlicensed transactions by Americans with Cuba or nationals thereof including payments for travel expenses, for accommodations, or for services." See 8 Foreign Affairs Manual § 249.92(c) (1966) (reproduced as Exhibit D to our supplemental brief in the court of appeals). See also Exhibit E to that brief (State Department handout to persons authorized to use United States passport for travel to Cuba during the 1960s). Thus, it was perfectly clear to all those who carried passports validated for travel to Cuba—including Members of Congress and their staffs—that the State and Treasury Departments took the position that unlicensed travel-related expenditures were prohibited by the TWEA regulations.

[13] Cf. *Haig* v. *Agee*, 453 U.S. 280, 303 (1981): "The Secretary has construed and applied his regulations consistently, and it would be anomalous to fault the Government because there were so few occasions to exercise the announced policy and practice."

Respondents attribute significance (Br. 25 & n.46) to the travel of three newsmen to China in the 1950s when that country was covered by a Section 5(b) assets control program. But respondents themselves acknowledge that the government considered prosecution of the newsmen under the TWEA.[14] And only a few months later the State Department issued a press release making it explicit that American news representatives wishing to travel to China were required to seek "licenses under the Trading with the Enemy Act" from the Treasury. See Department of State Press Release No. 473 (Aug. 22, 1957), *reprinted in Passport Legislation: Hearing on S. 806, et al. Before the Senate Comm. on Foreign Relations*, 86th Cong., 1st Sess. 171 (1959).

6. The continuity of the understanding that the President has authority (independent of Passport Act authority) to regulate travel-related financial transactions is further illustrated by the recent history of regulations under IEEPA. For it must be remembered that in IEEPA Congress in 1977 gave the President, in connection with new national emergencies (and in language identical to TWEA Section 5(b)), authority to "regulate" or "prohibit" "any * * * transactions involving, any property in which any foreign country or a national thereof has any interest" (50 U.S.C. (Supp. V) 1702(a)(1)(B)). Respondents are noticeably quiet on the question whether this IEEPA language comprehends the power to regulate transactions incident to travel; but their argument with respect to the TWEA clearly requires the conclusion—rejected by the court of appeals, see Pet. App. 12a—that the regulation of such transactions was excluded from IEEPA as well. Again, how-

---

[14] Respondents cite (Br. 21) a statement in Association of the Bar of the City of New York, *Freedom to Travel* 72 (1958), speculating that the decision not to prosecute the three newsmen was based on the conclusion of government officials that successful prosecution under the TWEA was not possible. No authority is cited for that statement. The cited newspaper article reporting the decision not to prosecute merely quotes a government official as stating, "[w]e do not want to see anyone boiled in oil." N.Y. Times, Feb. 21, 1957, at 13, col. 5.

ever, it is President Carter who acted directly on the opposite assumption. A few years after the passage of IEEPA (and after the 1978 amendment to the Passport Act) travel-related transactions involving Iran were prohibited in connection with the IEEPA embargo imposed on Iran in 1980. See 45 Fed. Reg. 26940 (1980) (codified at 31 C.F.R. 535.209 (1980)).

7. In sum, the history of regulation under both IEEPA and the TWEA—and, more specifically, the history of the Cuban Assets Control Regulations themselves—clearly compel a conclusion diametrically opposite to the one drawn by respondents. There has existed a long-standing and virtually unanimous understanding that TWEA Section 5(b) authorized the President to do exactly what the language of the statute says he may do in connection with a foreign assets embargo program: to regulate *all* property transactions, including those transactions incident to personal or business travel. This authority was not "ancillary" to or preempted by the regulation of passports by the State Department. It was an independent grant of authority that plainly validates the exercise of such power by a whole series of Presidents. And it is against this background that, we contend, Congress acted in 1977 when it grandfathered TWEA Section 5(b) "authorities" being exercised on July 1, 1977, and President Reagan acted in 1982 when he modified President Carter's 1977 general license and, in response to foreign policy needs, reimposed restrictions on the expenditure of American dollars by American tourists and business people traveling to Cuba.

II.

In Part I of their brief (at 10-20) respondents argue that in 1978 Congress, in amending the Passport Act, preempted all power—under either the TWEA or IEEPA [15]—to regulate financial transactions incident to

---

[15] Respondents guardedly acknowledge (Br. 20 n.35) that their Passport Act argument applies to IEEPA as well as the TWEA.

We believe, further, that the court of appeals did necessarily reject respondents' Passport Act argument. The court of appeals

personal travel. The claim in effect is that in 1978 Congress impliedly repealed powers granted and exercised under a statute on the books since 1917 and carefully continued—in both the grandfather clause and in IEEPA—in 1977; it also requires the conclusion that Congress in 1978 was invalidating the standing 1977 regulations under which President Carter continued to prohibit certain travel-related transactions (such as those incident to any scheduled flight to Cuba).

Respondents can point to no language in the 1978 amendment or any legislative history to support the implausible claim that Congress intended to effect such a wholesale repeal. In fact their argument is based entirely on their conceptual assumption that the regulation of travel is necessarily a single-track enterprise. Respondents simply assume that a decision that a passport should be granted for travel to a specific area cannot, in the nature of things, coexist with a continuing authority in the President to limit or prohibit the spending of American dollars incident to such travel. In fact, as already explained, these two questions do not have to be considered as a single question and have traditionally been considered separately on the basis of distinct statutory tracks.

In this connection it is important to keep in mind that the 1978 Passport Act amendment and the President's grandfathered TWEA authority to regulate economic transactions incident to travel have entirely different structures and scope; there is no foundation for respondents' dark hints that the government's position is that, notwithstanding the 1978 statute, area restrictions on travel can be generally reimposed by the "backdoor" of the TWEA. The Passport Act amendment deals only with passports but applies to *all* countries; it imposes

---

stated unequivocally that the President was free to regulate travel-related transactions in connection with a national emergency declared under IEEPA (Pet. App. 12a). That conclusion cannot, we believe, coexist with the proposition that, in 1978, Congress intended to repeal the Executive's authority to regulate such transactions under IEEPA *or* the grandfather clause.

limits on the President's power to bar travel directly by limiting the validity of passports in specific areas. The grandfather clause operates on an entirely different basis. It authorizes the continuation of regulations with respect to a broad category of economic transactions (of which travel-related transactions are only a small part); but it applies only to a tiny part of the world—the four countries for which comprehensive embargoes were in place on July 1, 1977. There is thus no substance to the suggestion that the grandfather clause (as read by the government) cannot coexist with the 1978 Passport Act amendment because it would allow the Executive to recreate the very regime of area restrictions Congress intended in 1978 to eliminate. The two statutes can coexist quite harmoniously. See *United States* v. *Yoshida International, Inc.*, 526 F.2d 560, 578 (C.C.P.A. 1975). The Passport Act ensures on a world-wide basis that area passport restrictions can only be imposed under limited circumstances. At the same time, the President continues to have TWEA authority to prevent American citizens from transferring American currency to benefit the economy of those four countries with which—by hypothesis—our relations are so difficult and sensitive that a continuing comprehensive assets embargo has been judged to be in the national interest.[16]

III.

Respondents' contentions with respect to the grandfather clause (Br. 32-51) were generally anticipated in our principal brief and require only a short reply.[17]

---

[16] The President would also continue to have authority to regulate travel-related transactions in connection with new embargoes imposed in connection with new national emergencies declared under IEEPA.

[17] Respondents say remarkably little about the statute's language (preserving "authorities" being exercised on July 1, 1977) or its structure. Instead, they continue their practice of rewording the statute to fit their own construction. Respondents have abandoned their previous references to grandfathering of "prohibitions" and "restrictions"; they now characterize the grandfather clause as

1. Respondents accuse us (Br. 46-47, 49-50) of advocating a construction of the grandfather clause that would give the President unlimited flexibility to exercise TWEA powers with respect to any country. That contention is frivolous. As we explained in our opening brief (at 38-52), the legislative history shows that Congress intended to grandfather broad Section 5(b) authority (including the authority to regulate travel-related transactions), but *only* for those countries for which there were comprehensive assets control programs in place on July 1, 1977—Cuba, Vietnam, Cambodia, and North Korea. It is true that certain narrow TWEA controls were in effect for other countries on July 1, 1977 (*e.g.*, an assets freeze for certain Eastern European countries and China, and a special set of rules (see 31 C.F.R. Pt. 505 (1977)) that prohibited the shipment of certain strategic items). But no one has ever suggested that these limited controls could serve as a springboard for the imposition of broad assets control programs for all of these countries. Our argument is simply that the grandfather clause should be construed to give meaning to Congress's intent that the President not be required to declare a new national emergency for the four countries that were subject to comprehensive embargoes in 1977.[18]

---

preserving "specific existing regulations" (see Br. 9, 37, 38, 39, 40, 44). But the grandfather clause simply does not use these words.

Respondents criticize (Br. 49-50) our suggestion that, to the extent Congress may have intended to distinguish among classes of TWEA authorities, it thought in terms of the broad categories of currency controls, assets controls, and vesting. But respondents themselves propose a classification—economic transactions relating to travel as against all other economic transactions—without support in the statutory language or legislative history. In contrast, the categories we refer to appear on the face of Section 5(b) itself (as well as in IEEPA), and were distinguished at several points in the legislative history of the grandfather clause. See Gov't Br. 19, 46, 48 & n.44.

[18] Respondents note (Br. 48) that on July 1, 1977, there was a broad prohibition on unlicensed property transactions involving

2. Respondents suggest (Br. 47) that our argument that it is significant that the Cuban embargo (like other assets control programs) has continuously operated through a broad prohibition on unlicensed transactions accompanied by adjustable and revocable specific and general licenses implies that the coverage of the grandfather clause is dependent on "arbitrary drafting decisions." But there is not the slightest evidence that this traditional structure of regulation has ever led to manipulation or bureaucratic "contingent choices" (*ibid.*). In fact the choice whether to end an embargo entirely or merely to license transactions while leaving the overall embargo in place is not a drafting matter but a substantive policy choice. The former step is taken when relations with a country are normalized. As we explained in our opening brief (at 30-32), prior to that time, licensing is used in order to "fine tune" an embargo in response to foreign policy needs, without abrogating the underlying regulatory authority. Thus President Carter's 1977 decision to promulgate a revocable general license for travel-related transactions, qualified by specific restrictions, rather than to cut back on or end the underlying regulatory prohibition contained in 31 C.F.R. 515.201 (1977), was not an accident of draftsmanship;

China, accompanied by a general license permitting most such transactions, and assert that the Chinese assets control program, too, would be preserved under our reading of the grandfather clause. The legislative history is not clear on this point. Congress certainly intended to grandfather the freeze of Chinese assets until a satisfactory claims settlement agreement with China could be reached. See, *e.g.*, *Emergency Controls on International Economic Transactions: Hearings on H.R. 1560 and H.R. 2382 Before the Subcomm. on International Economic Policy and Trade of the House Comm. on International Relations*, 95th Cong., 1st Sess. 207 (1977). Congress may have contemplated that the President would have authority to narrow the general license if relations with China deteriorated after July 1, 1977. But the Executive has never attempted to exercise such an authority. The issue is in any case moot. As noted in our opening brief (at 31 n.29), a claims settlement agreement with China was reached, and the President ended the assets control program for China in 1980.

rather, it was a meaningful substantive choice to continue the exercise of regulatory authority.[19]

3. Respondents' discussion of the legislative history has one fundamental defect: lack of balance. Respondents urge (Br. 32-39) that Congress's single overriding purpose in 1977 was to cut back on the President's flexibility and to reallocate power from the Executive to Congress. In fact, as explained in our opening brief (at 38-42), Congress was moved by serious countervailing concerns. On the one hand, Congress wished to impose procedural limitations on the Executive's power to act on the basis of peacetime emergency powers and to increase the role of the legislative branch. On the other hand, Congress recognized that it would be virtually impossible to obtain agreement on legislation that would sweep within the new emergency powers scheme the existing assets control programs for Cuba, Vietnam, North Korea, and Cambodia, and that grandfathering of those programs was therefore necessary.[20]

---

[19] Respondents demonstrate their fundamental misunderstanding of assets control programs when they state (Br. 47) that on July 1, 1977, United States citizens could make expenditures in connection with travel to Cuba "without permission from the United States government." The general license issued by President Carter in 1977 quite explicitly constituted a "permission" for such travel-related expenditures ("the following expenditures are authorized * * *").

[20] Respondents' own explanation of the purposes of the grandfather clause contradicts their construction of that provision. They acknowledge (Br. 37-38) that Congress enacted the grandfather clause in part to preserve diplomatic "bargaining chips" the President could use in negotiating with countries like Cuba. But a bargaining chip cannot be effective if all the President can do is to *eliminate* restrictions. Under respondents' construction of the grandfather clause, the President is limited to making an endless series of concessions.

Respondents' allegation (Br. 3, 38 n.68) that the grandfather clause was to be used to "phase out" existing TWEA programs is simply wrong. Several subcommittee members raised the possibility that the embargoes against Cuba and the other countries could be ended. Chairman Bingham responded that it would be impossible to accomplish that result in the legislation that included the grandfather clause and that termination of existing embargoes would

In their discussion of the legislative history respondents ignore the significance of the evolution of the statute, a process during which Congress and the Executive negotiated a compromise acceptable to both branches. They cite selective snippets, mostly from the early days of the subcommittee hearings, before subcommittee members came to appreciate fully the necessity of grandfathering the existing embargoes. Thus respondents place heavy reliance on Representative Bingham's statements at an early stage in the drafting process leading to the remark that, in his view, it seemed unnecessary to give the President authority to "expand what has already been done." *Emergency Controls on International Economic Transactions: Hearings on H.R. 1560 and H.R. 2382 Before the Subcomm. on International Economic Policy and Trade of the House Comm. on International Relations*, 95th Cong., 1st Sess. 167 (1977). In our opening brief (at 47-50) we took special care to set out the full context of Representative Bingham's statements (*id.* at 47-48 n.44). That exposition, which we will not repeat here, demonstrates that these remarks, when placed in the context of the legislative process as a whole, do not support respondents' crabbed construction of the grandfather clause—whether they are quoted once or repeated (as respondents do, see Br. 39, 41-42, 43, 46, 49) five times.

IV.

Respondents' argument that the Constitution invalidates the 1982 regulation restricting the expenditure of American funds by travelers to Cuba does not merit extended reply. Respondents' suggestion (Br. 54) that this regulation constitutes a *more* serious impediment to travel than the passport restrictions upheld in *Zemel* v. *Rusk*, 381 U.S. 1 (1965), and *Haig* v. *Agee*, 453 U.S. 280

---

have to await separate legislation. He explained: "This is essentially an act trying to clear up the mess that the [TWEA] has left us in. We can always move on the front of Vietnam or Cuba * * *. However, to get this through in reasonably good form, we would like not to raise that particular controversy." *Hearings*, *supra*, note 18, at 210.

(1981), seem to us quite topsy turvy; as a practical matter travel without a valid passport is virtually impossible, whereas the TWEA regulation does not apply to hosted travel and also makes substantial provision for other important sorts of general and specific licenses. Beyond this, respondents' arguments add up to no more than disparagement of the significance of the foreign policy concerns with respect to Cuba that animated the 1982 regulation. Thus respondents suggest (Br. 55) that our relations with Cuba are marked only by " 'normal' tensions inherent in contemporary international affairs." With respect, we cannot accede to the suggestion that our relations with Cuba involve no more than " 'normal' tensions." But, in any event, respondents' efforts to second-guess the wisdom and effectiveness of the President's 1982 decision to tighten the general license for travel-related transactions with respect to Cuba have no place in this case. Whether the "national interest" justified President Carter's and President Reagan's annual determinations to keep alive the extraordinary Cuban assets embargo under the TWEA, and, more particularly, President Reagan's determination in 1982 to prohibit certain travel-related transactions under that embargo, is not a question for *de novo* redetermination either by respondents or the courts.[21] Congress in the TWEA and the

[21] Throughout their brief respondents continuously and flatly assert that the 1982 regulation imposed restrictions on travel-related transactions in Cuba even though no "national emergency" in our relations with Cuba in fact existed to justify those restrictions. (At one point (see Br. 32) they even assert, erroneously, that the government has conceded that no "emergency" justifies those regulations.) These claims are wholly misleading and muddled. They collapse two distinct questions into one. The first is: what are the *legal* predicates necessary for the imposition and continuation of the Cuban assets embargo? The second is: what in *fact* is the state of our relations with Cuba? The President, acting under the grandfather clause, has no legal obligation to find that a "national emergency" exists in order to continue an existing TWEA embargo; President Reagan therefore has continued the Cuban embargo without making such a finding, acting on the grandfather clause's statutory criterion of "the national interest of the United States." The fact that no "national emergency" finding was

grandfather clause specifically authorized the President to continue in place a comprehensive assets control program directed at Cuba (and not Israel or England or Italy, cf. Br. 55)—a country that for a quarter century has continuously engaged in activities seriously inimical to the interests of the United States. The President determined in 1982 that, in light of the then current developments, that program should include measures to prevent Americans from conferring substantial economic benefits on Cuba through the expenditure of tourist dollars in that country. That determination can hardly be characterized as arbitrary or irrational; its wisdom is not a proper subject of debate in this litigation.

CONCLUSION

For the foregoing reasons, and the reasons discussed in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General
RICHARD K. WILLARD
Acting Assistant Attorney General
PAUL M. BATOR
Deputy Solicitor General
CAROLYN F. CORWIN
Assistant to the Solicitor General
HAROLD J. KRENT
Attorney

PETER J. WALLISON
General Counsel
Department of the Treasury
DAVIS R. ROBINSON
Legal Adviser
Department of State

APRIL 1984

---

made in 1982 does not, therefore, have any probative force at all on the question whether, as a matter of *fact*, our relations with Cuba in 1982 (or since) have or have not reached an "emergency" state.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 421023 528